

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Grand River Dam Authority

Project No. 1494-310

ORDER DENYING REHEARING

(Issued May 17, 2007)

1. On May 19, 2006, the Paris Cove Homeowners' Association, Inc. (Homeowners' Association) filed a letter alleging that Grand River Dam Authority (Grand River), licensee for the Pensacola Project No. 1494, improperly issued permits authorizing the installation of a four-slip and a five-slip dock for private rather than commercial use. The docks are located in Paris Cove on Grand Lake O' the Cherokees (Grand Lake), the project's reservoir, in northeastern Oklahoma.
2. By letter of February 12, 2007, Commission staff ordered Grand River to file an "after-the-fact" request for permission to authorize the existing four-slip dock for use by guests of a resort and to provide written confirmation that the five-slip dock is intended to serve only the adjacent single-family residence and is not associated with a nearby resort. Grand River filed a timely request for rehearing of the order, asserting that staff erred in finding that the four-slip dock requires Commission authorization.

Background

A. Grand River's Shoreline Management

3. The 46,500-acre Grand Lake has 1,300 miles of shoreline and extends 66 miles upstream of the Pensacola Project dam. The Commission regulates only a strip of land (of varying horizontal distance, depending on the steepness of the terrain) around the reservoir's perimeter.

4. Article 410 of the project's license gives Grand River the authority, without prior Commission approval, to grant permission for certain types of non-project use and occupancy of project lands and waters and to convey interests in project lands and waters for certain other types of non-project use and occupancy.¹ Grand River may permit the construction of non-commercial private boat docks on its shoreline, if the docks are for no more than ten watercraft and are intended to serve single-family dwellings.² For private or public marinas of no more than ten watercraft and located at least one-half mile from any other private or public marina, Grand River must notify the Commission and provide an opportunity for Commission review of the proposed facilities prior to Grand River authorizing their construction.³ For docks that do not fit into either of these categories, Grand River must file an application for prior Commission authorization.

5. Grand River's consideration of requests for permission to use its project shoreline and waters and its regulation of activities within the project reservoir are guided by its Lake Rules and Regulations, which were issued in June 2006.⁴ These Rules and Regulations set forth provisions for dock permits, including a requirement that Grand River must give prior approval for the construction of any docking facilities within the project boundary. The regulations establish application requirements and permitting procedures for private-use docks and for commercial-use docks.⁵

¹ 59 FERC ¶ 62,073 at 63,231 (1992).

² See Article 410(b).

³ See Article 410(d)(5). At least 45 days before conveying an interest in project lands for a private or public marina under Article 410(d), the licensee must file with the Commission a letter describing the interest to be conveyed and the proposed use, showing the proposed location of lands to be conveyed, specifying any state or federal approvals, and documenting agency consultation. The licensee may go forward and convey the intended interest, unless within 45 days from filing its letter, it receives Commission notification that it must file an application for prior approval.

⁴ See [www.grda.com/Water/Publications/Official GRDALakeRules2006.pdf](http://www.grda.com/Water/Publications/Official%20GRDALakeRules2006.pdf). Currently, there is no shoreline management plan (SMP) for the Pensacola Project, nor does the project license require it. However, according to Grand River's website, Grand River issued a working draft of an SMP on December 20, 2006. See <http://www.grda.com/Water/SMP/smp.html>.

⁵ 2006 Lake Rules and Regulations, *supra* n. 4, at 13-14.

B. The Docks at Issue

6. In July 2003, Grand River granted Jeff and Gara Pelcher a private dock permit for a four-slip dock, to use in connection with their residence in Paris Cove. Subsequently, the Pelchers established Candlewyck Cove Resort. It is a seven-acre resort that rents suites, cottages, and a large house. Currently, the four-slip dock is used by resort guests. In 2005, the Pelcher's son Derrick applied for, and was granted, a private-use permit from Grand River for a five-slip boat dock to be used by Derrick Pelcher's single-family residence adjacent to the resort.

7. The Homeowners' Association's May 19, 2006 letter alleged that Grand River improperly issued permits for these docks. Specifically, it contended that commercial (rather than private) use permits are required because the docks are part of the resort. Grand River did not respond to the Association's letter. As noted previously, under Grand River's license, it may authorize small, non-commercial private docks for residential use without prior Commission approval, but for other docks, Grand River must first notify the Commission, which may then require Grand River to file an application for Commission approval.⁶

8. Commission staff looked into the allegation and issued its February 12, 2007 letter finding that the five-slip dock owned by the Pelcher's son is appropriately classified for private use, but that the resort's four-slip dock is inappropriately classified as private use. The letter explained that, contrary to Grand River's assertion, the use of the dock by patrons of Candlewyck Cove Resort is not a residential use that Grand River may authorize without notifying the Commission pursuant to paragraph (d) of Article 410. The letter further found that Grand River's misapplication of the requirements of Article 410 constituted a violation of its license. The letter therefore required that Grand River file an after-the-fact request for Commission authorization under paragraph (d) of Article 410 to issue a permit for the commercial use of the dock.⁷

⁶ See n. 3, *supra*.

⁷ The letter also required Grand River to file a statement confirming that Derrick Pelcher's five-slip dock is indeed used by his single-family residence and not by the resort. On March 13, 2007, Grand River filed, under protest, its "after-the-fact" request. The filing does not include the required statement confirming the residential use of Derrick Pelcher's dock. Instead, it proposes removing the four- and five-slip docks and replacing them with one nine-slip dock, which will be used by the resort's guests. It thus appears that in fact Derrick Pelcher's dock was not used solely by his residence. In addition, the filing notifies the Commission that Grand River is also reviewing an
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9. On March 14, 2007, Grand River filed its request for rehearing, objecting to Commission staff's findings that the four-slip dock is not a private dock, and that Grand River violated its license.

Discussion

A. Courtesy Docks Do Not Fit the Requirements of Article 410(b).

10. Grand River states that the resort's guests do not pay rental for use of a slip and that not all guests use the slips.⁸ Grand River views this use as a "courtesy dock." Although Grand River's Rules and Regulations do not define the term, Grand River contends that it has historically defined a "courtesy dock" as a dock that the patrons of a business establishment use when visiting the business, but for which the patrons are not charged, *i.e.*, use of the dock is a gift or privilege to a patron during the time the patron is obtaining services from the business.⁹ Grand River considers such "courtesy docks" to be "private docks" under Article 410(b), which can be authorized by Grand River without prior Commission approval.

11. Grand River's authorization of courtesy docks under Article 410(b) is inconsistent with the plain language of that article. Article 410(b) provides that the licensee may grant permission without prior Commission approval for "*non-commercial... boat docks...[for] no more than 10 watercraft...where said facility... serve[s] single-family type dwellings.*" (Emphasis added.)¹⁰

application for a new five-slip dock (adjacent to the resort's dock) that would be used by residential, single-family homeowners of a residential subdivision to be built adjacent to the resort. By letter dated April 26, 2007, Commission staff found that the proposed nine-slip dock is within the scope of Article 410(d)(5), and informed Grand River that it may authorize the dock in accordance with the article's requirements.

⁸ The brochure featured on the resort's website lists "free courtesy covered boat slips" as an amenity. See www.candlewyckcove.com.

⁹ Request for Rehearing at 4.

¹⁰ For other similarly sized docks that do not serve single family residences, the prior notification procedures in Article 410(d) are applicable. Grand River argues that Article 410(d) does not apply because it refers to "private marinas," and courtesy docks should not be classified as such. However, we read that term broadly to include any

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12. The language of Article 410(b) is clear. It covers docks that serve single family residences. Courtesy docks serve customers of businesses, and thus come under paragraph (d) of Article 410, not paragraph (b).¹¹ This finding is consistent with Grand River's own permitting procedures. Its "private dock" application is for a "residential" dock, defined as a "non-commercial Dock accommodating 10 or less watercraft associated with a single-family residence for which no compensation is/will be received by the owner of the Dock for its use."¹² Its "commercial dock" application defines commercial docks as "docks intended to serve non-residential enterprises operated, directly or indirectly, for pecuniary profit or gain."¹³

13. The dock at issue was originally authorized under Article 410(b) as a private dock serving a single-family residence. It now is used by guests of the resort, and must be authorized under the procedures in Article 410(d).

14. Grand River believes it would be administratively burdensome to have to identify whenever a change in dock use occurs, as it would force the licensee to depend on the dock owner to reveal how the dock is used and when the use of the private dock changes. Despite the inconvenience, under Article 410, licensees have the continuing

docking facilities with ten or less slips that do not serve single family residences. This reading of the provision allows for facilities (both private and public) to be authorized under the prior-notice procedures of Article 410(d) that otherwise would require prior Commission approval.

¹¹ Grand River contends that this finding will have a lake-wide effect because it has been treating courtesy docks as fitting the provisions of Article 410(b). However, such treatment is contrary to the express language of that article.

¹² This definition is listed on page 1 of Grand River's Safety and Construction Standards for New and Existing Residential Docks, which can be found on its website at www.grda.com/Water/Forms/Dockapplicationpacket2006.pdf.

¹³ This definition is listed on page 9 of Grand River's publication, entitled "Commercial Project – Permitting Process," which can be found on its website at www.grda.com/Water/Forms/Commercial Project Permitting Process Packet.pdf. Although patrons of the Candlewyck Cove Resort are not charged a fee to use the boat slips, the patrons of the resort pay for accommodations, and the slips are an amenity included in their rental of the accommodations. Thus, it would appear that, under Grand River's permitting processes, the resort's application to Grand River should be for a commercial, not a residential, dock.

responsibility to supervise and control the uses and occupancies for which they grant permission, and to monitor the use of, and ensure compliance with, any interests that are conveyed under the article. In the future, Grand River may want to condition its authorizations to ensure that Grand River is notified in the event a permitted use changes, where the change would require a new authorization.

B. Grand River's Misapplication of Article 410(b) Constitutes a Violation of its License.

15. Grand River argues that it should have been given the opportunity to remedy the situation before a violation determination was rendered and that staff's failure to provide such an opportunity deprived it of due process. Grand River's argument is disingenuous, for Grand River was aware of the changed use for the dock in 2006, but it chose not to take immediate action. Instead, it argued, unreasonably, that "courtesy docks" like the ones used by Candlewyck Cove Resort meet the non-commercial, single-family-residential-use provisions of Article 410(b) and can thus be authorized by Grand River without prior Commission approval. This reading of Article 410(b) is contrary to the plain language of the article and Grand River's resulting action is a violation of its license.

The Commission orders:

The request for rehearing filed in this proceeding by Grand River Dam Authority on March 14, 2007, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.